Washoe Medical Center, Inc. *and* Operating Engineers Local No. 3, International Union of Operating Engineers, AFL–CIO. Cases 32–CA–17934–1 and 32–CA–18179–1

July 31, 2002

ORDER DENYING MOTION FOR RECONSIDERATION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On December 20, 2001, the National Labor Relations Board issued a Decision and Order in this proceeding finding, in relevant part, that the Respondent violated Section 8(a)(5) and (1) of the Act by continuing to unilaterally set starting wage rates for newly hired employees after the Union's certification, without providing the Union with advance notice and an opportunity to bargain.[1] On February 5, 2002, the Respondent, Washoe Medical Center, Inc., filed a Motion for Reconsideration. The General Counsel and the Union filed briefs opposing the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the matter and finds that the Respondent has not presented extraordinary circumstances warranting reconsideration.[2]

The Respondent contends that the disposition of this case is governed by the Board's decision in *Monterey Newspapers, Inc.*, 334 NLRB No. 128 (2001), and that the Board's failure to apply *Monterey Newspapers* in this case was a substantial and prejudicial error warranting reconsideration.[3] We disagree that *Monterey Newspapers* is dispositive here, as explained below. Accordingly, the failure of the Board to apply *Monterey Newspapers* does not constitute extraordinary circumstances warranting reconsideration.

The dispositive issue in *Monterey Newspapers* was the employer's right, as a *successor* employer pursuant to *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), to establish initial terms and conditions of employment, including wage rates for new hires. The Board majority found that the employer did not violate the Act by unilaterally setting initial wage rates, including a separate "pay band" system for new hires. The Board majority explained that "the setting of initial employment terms by a lawful *Burns* successor stands on different footing than decisions made by an incumbent employer." 334 NLRB No. 128, slip op. at 3 and fn. 11.

It is this "different footing" that renders *Monterey Newspapers* inapposite to this case.[4] Here, the issue is whether, following a union certification, an *incumbent* employer (i.e., a continuing employer, not a successor) could lawfully establish initial wage rates for new hires without giving the Union notice and an opportunity to bargain. The Board majority found that the Respondent violated the Act. Chairman Hurtgen dissented from the majority opinion.[5] Notwithstanding the difference of opinion embodied in the Board's decision on the merits, we agree that *Monterey Newspapers* does not govern the disposition of this case. Accordingly, the Board's asserted failure to apply that case here does not constitute extraordinary circumstances warranting reconsideration.

In further support of its motion for reconsideration, Respondent relies on the Board's decision in *Oneita Knitting Mills*, 205 NLRB 500. However, Respondent previously relied on that case. The Board, in its initial decision herein, rejected the argument. Thus, Respondent's reliance on *Oneita* does not present an "extraordinary circumstance" warranting reconsideration of the initial decision.

Finally, the Respondent contends, as a basis for its motion for reconsideration, that the Board failed to address the Respondent's argument that the Union waived its bargaining rights with regard to starting rates of pay for new employees. However, the Board *did* address this argument. The Board adopted the judge's finding that "[t]he evidence clearly shows otherwise. The Union consistently expressed a concern [during negotiations] over the starting wages of unit employees . . . . The Union made several requests to bargain over the starting wages . . . ."

Member Cowen would grant the Respondent's Motion for Reconsideration because he disagrees with the result previously reached.[6] He does not contend that the Re-

[1] 337 NLRB No. 32.

[2] Sec. 102.48(d)(1), NLRB Rules and Regulations, Series 8, as amended.

[3] *Monterey Newspapers* was pending before the Board when the Respondent filed its exceptions in the instant case. The Board issued its decision in *Monterey Newspapers* before it issued the decision in the instant case. The Respondent has raised the issue of the applicability of *Monterey Newspapers* for the first time in its Motion for Reconsideration.

[4] Member Liebman dissented from the majority opinion. In her view, the "pay band" system provided for sufficient employer discretion that the Respondent was required to offer to bargain with the Union over the exercise of that discretion. 334 NLRB No. 128, slip op. at 4 and fn. 2.

[5] Chairman Hurtgen adheres to his position. However, he agrees that the Respondent has not presented extraordinary circumstances warranting reconsideration of the Board's decision. In this regard, Chairman Hurtgen notes that *Monterey Newspapers* issued on August 9, 2001. The decision in the instant case issued on December 20, 2001. In the interim 4-plus months, the Respondent did not even seek leave to argue the applicability of *Monterey*. Accordingly, the issuance of *Monterey* is not such an extraordinary circumstance as to warrant reconsideration of the prior decision herein.

[6] Member Cowen, who was appointed to the Board after the original decision in this case was issued, did not participate in the original decision.

spondent has presented extraordinary circumstances warranting review of the original decision, the only basis in the Board's rules for reconsidering a decision of the Board. Rather, he simply sets forth his analysis of the facts and interpretation of applicable law. Thus, he would, in effect, engage in reconsideration of a matter already litigated, considered, and rejected. This is contrary to the Board's rules, and this is why we do not address his discussion of the merits of this case.

IT IS ORDERED that the Motion for Reconsideration is denied.

Dated, Washington, D.C. July 31, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

I would grant the Respondent's motion for reconsideration, overrule the underlying decision, *Washoe Medical Center*, 337 NLRB No. 32 (2001) (*Washoe I*), and dismiss the complaint.[1]

In the underlying decision, the panel majority found that the Respondent unlawfully continued unilaterally to set starting wages for newly hired unit nurses after the Union was certified to represent them. The Respondent argues, inter alia, that its established standardized procedure for setting starting wages for newly hired nurses existed before the Union became their representative and that there has been no change in the procedure since then.

Essentially, the Respondent has an established salary range for newly hired nurses: (1) between $18.15–$25.41 per hour for registered nurses, including per diem nurses, and (2) a flat $15.41 for nurses who have just graduated from school, with an automatic increase to $18.15 once they pass their licensing examinations. There has been no deviation from this hiring range at any time material.

The $18.15–$25.41 range is divided into quartiles; the range for the first quartile is $18.15–$19.97. To determine into which quartile to place a new hire, the hiring manager of the particular nursing department and the human resources department jointly determine an appropriate starting wage rate based on the applicant's qualifications, experience, specialty certifications, and the existing wage rates of the nurses already working in that particular department. If, as is the case for about half of the newly hired nurses, the resulting determination is that the applicant should be placed in the first quartile for purposes of setting the starting wage, then the hiring manager sets the specific starting wage within the quartile range. If, on the other hand, the resulting determination is that the applicant should be placed in the second, third or fourth quartile, then the hiring manager must obtain approval for the particular starting wage from the human resources department and the vice president for nursing.

This policy and procedure has been followed consistently at all times material herein, both before and after the Union certification. Moreover, there is no suggestion in the record that the impact of this practice on the bargaining unit employees has changed in any respect whatsoever. While the Respondent has continued to exercise some limited discretion in the setting of wage rates for new hires, there is no evidence that the Respondent's exercise of discretion has changed in its scope generally, or its application to particular circumstances. There is no claim that a nurse has been placed in a particular quartile postcertification, when a similarly situated nurse was placed in a different quartile precertification. Nor is there any claim that the specific starting wage rate for any particular nurse postcertification is inconsistent with the precertification starting wage rates for similarly situated nurses. In short, in terms of its impact on the bargaining unit employees the Respondent's hiring practice has not manifested itself in any different manner at any relevant time.

In nevertheless finding in the underlying decision that the Respondent violated Section 8(a)(5) and (1) by continuing unilaterally to set starting wages for newly hired employees after the Union became the bargaining representative, the panel majority relied upon *Oneita Knitting Mills*, 205 NLRB 500 (1973). There, the Board held that once employees choose to be represented by a union, not only must their employer not unilaterally *discontinue* a pre-union discretionary merit wage increase program, but also the employer must not exercise unfettered discretion with respect to the determination of the actual timing and amounts of the wage increases. In a different but analogous context in the underlying decision, dealing with the Respondent's alleged unlawful continued unilateral imposition of specific discretionary discipline on particular employees even after the Union won the election, the panel majority found that, in light of *Oneita*, in order to establish that the Respondent had unlawfully continued

[1] My colleagues suggest that it is not appropriate for me to express my view in this case because Respondent allegedly has not "presented extraordinary circumstances warranting review of the original decision." I do not agree. As noted in the text, *Washoe I* is based upon an erroneous interpretation of *Oneita Knitting Mills*, 205 NLRB 500 (1973). Moreover, to the extent that the panel majority in *Washoe I* suggests that no "change" is necessary to prove that a respondent violates Sec. 8(a)(5) of the Act by unilaterally changing terms and conditions of employment, *Washoe I* constitutes an unwarranted departure from long-standing Board precedent without reasoning or explanation. In my view, this unexplained departure from precedent is itself an extraordinary circumstance justifying reconsideration.

after the union's election unilaterally to exercise its discretion in imposing specific discretionary discipline on particular employees, the General Counsel would only need to show some exercise of discretion by the Respondent in the imposition of discipline, but would not need to show also that the imposition of discipline constituted a *change* in the Respondent's policies and procedures. 337 NLRB No. 32, slip op. at 1 fn. 1.

I disagree with that proposition, which constitutes an erroneous interpretation of *Oneita* to the extent that it makes it an unfair labor practice for an employer unilaterally to continue to follow an established policy and procedure, even one involving the exercise of some employer discretion, without changing the policy or procedure in any material way, after a union becomes the bargaining representative of the employer's employees. In order to establish unlawful conduct in this context, the General Counsel should be required to establish that, following the arrival of the Union, the employer materially changed the status quo that existed prior to the Union. It is clear as a general matter that an employer may not unilaterally *change* terms and conditions of employment once a union has become the bargaining representative for the employer's employees. But an employer should be permitted to continue unilaterally to *follow, without material change,* an established policy or procedure even after the arrival of a union—including a procedure that has all along involved the exercise of employer discretion.

Here, the Respondent has at all material times, both before and following the arrival of the Union, consistently administered its unchanged established policy and procedure for setting starting wage rates for nurses. Its conduct—and its exercise of discretion within the course of that conduct—has not changed. Prior to the arrival of the Union, the Respondent consistently set starting wage rates for nurses in an established range between $18.15–$25.41, exercising, to be sure, some discretion in the process. Since the arrival of the Union, the Respondent has continued to do just that, and no more or less. Nothing has changed—including the Respondent's exercise of discretion in administering this established policy. I would not find that an employer, who has faithfully adhered without change to an established policy and procedure after the arrival of a union as the representative of its employees, has committed an unfair labor practice.

Dated, Washington, D.C. July 31, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD